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October 22, 2004

The Honorable Chester J. Culver
Iowa Secretary of State
State Capitol Building
Des Moines, Iowa 50319

Dear Secretary Culver:

On October 12, 2004, you submitted a request for an opinion addressing two issues concerning the impact of the Help America Vote Act upon Iowa election practices. Because resolution of each of these issues has the potential to have a significant impact on procedures for the upcoming November 2, 2004, general election, we provide an expedited response through informal advice. This letter addresses only your second inquiry regarding provisional voting.

Section 302(a) of HAVA requires election officials to notify all individuals who appear at the polls that they may cast a provisional ballot if they declare that "they are registered voters of the jurisdiction in which they desire to vote" and that they "are eligible to vote in an election for Federal office." 42 U.S.C. 15482(a)(1). Individuals who sign a written affirmation indicating that they are registered in the jurisdiction and eligible to vote in the election must be allowed to cast a provisional ballot at that polling place. 42 U.S.C. 15482(a)(2). If upon review state or local officials determine "that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law." 42 U.S.C. 15482(a)(4). In interpreting HAVA, it is important to further the purposes of the Act – to make it easier to vote and harder to cheat in elections.

The concept of provisional voting is not new to Iowa election law. For nearly thirty years, Iowa law has allowed voters whose names do not appear upon the election register for the precinct polling place at which the voters appear and voters whose qualification to vote are otherwise challenged to cast provisional ballots. These ballots have historically been referred to as challenged or special ballots. See 1975 Iowa Acts (66 G.A.) ch. 81, §§ 77-80. Under current Iowa law, a provisional ballot is available to: (1) "a person whose name does not appear on the

election register of the precinct in which the person claims a right to vote;" (2) "a person who has been sent an absentee ballot by mail but for any reason has not received it;" (3) any person appearing to vote who has been challenged as unqualified; and (4) any person who is required to show identification if the voter is unable to present identification at the polls on election day. Iowa Code §§ 49.77(4), 49.79 (2003) and 48A.8(4) as amended by 2004 Iowa Acts, ch. 90, § 6.

Your inquiry concerns only the first category of provisional voters, those who are unable to vote regular ballots at the polls because their names do not appear on the precinct election register. Questions have arisen regarding whether HAVA section 302(a) requires states to count provisional ballots which are cast in the wrong precinct by otherwise qualified registered voters of a county. It is our current understanding that the states are approximately equally split on whether or not provisional ballots cast in the wrong polling place will be counted. At least five states that have laws requiring rejection of such ballots have been sued in recent months over this practice. Orders have been issued by the United States District Courts hearing these challenges in Missouri, Ohio, Michigan, and Florida. The Ohio and Michigan courts concluded that HAVA preempted a state from rejecting a provisional ballot which was cast by an otherwise eligible registered voter solely because the ballot was cast outside of the voter's precinct of residence. Sandusky County Democratic Party v. Blackwell, ___ F.Supp.2d ___ (2004 WL 2308862) (N.D. Ohio, Oct. 14, 2004); Bay County Democratic Party v. Land, ___ F.Supp.2d ___, 2004 WL 2345560 (E.D. Mich., Oct. 19, 2004). The Missouri court upheld that state's practice of counting only those ballots which were cast in the appropriate precinct, absent evidence that the voter had been directed to the wrong polling place by election officials, thus concluding that HAVA does not require states to count provisional ballots cast in the wrong polling place. Hawkins v. Blunt, 04-4177- CV-C-RED (W.D. Mo., Oct. 12, 2004). In a decision issued on October 21, 2004, the Florida district court rejected the HAVA preemption argument, concluding that although the federal act required states to allow voters to cast provisional ballots outside of their precinct of residence, HAVA left to the states the determination if those ballots would be counted. The Florida Democratic Party v. Hood, 4:04cv395-RH/WCS (N.D. Fla., Oct. 21, 2004).¹

Against this background, you have asked us to examine whether section 302(a) of HAVA requires provisional ballots which are cast in the wrong precinct to be counted, thereby preempting the provisions of Iowa law which would require rejection of these ballots. If we conclude that HAVA does require this result, you ask whether only the federal portion of the ballots, or all federal, state and local offices and questions for which the voter could have voted in the voter's precinct of residence should be counted.

¹ A Colorado state district court has also upheld statutes of that state which require rejection of a provisional ballot cast in the incorrect precinct, concluding that HAVA section 302(a) allows state eligibility criteria to control this determination. Colorado Common Cause v. Davidson, No. 04CV7709 (Colo. State D.Ct., Denver, 10/18/04).

The basic principles of preemption set forth in the analysis in our October 20, 2004, letter to you are equally applicable here. "[I]t has been settled that state law that conflicts with federal law is 'without effect.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, ____ (1992). HAVA contains no general preemption clause and there is no evidence that Congress intended to "occupy the field" of election law requirements. Rather, section 304 of HAVA explicitly provides that the requirements of HAVA Title III "are minimum requirements" and that nothing in the title "shall be construed to prevent a State from establishing election . . . administration requirements that are more strict than the requirements established under this subchapter so long as such State requirements are not inconsistent with the Federal requirements . . ." 42 U.S.C. § 15848 [HAVA § 304].

State law requirements may not be found inconsistent with HAVA unless they "actually conflict" with the requirements of HAVA. An actual conflict exists if "it is impossible to comply with both state and federal law, or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581, 107 S.Ct. 1419, 1425, ____ L.Ed.2d ____ (1987) (quotations and citations omitted).

Therefore, in order to resolve this inquiry, we must determine exactly what HAVA requires. As in all cases of statutory construction, our "analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). The following portions of HAVA section 302(a) control our inquiry:

(a) Provisional Voting Requirements.-- If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

* * *

42 U.S.C. § 15482(a)(1)-(4) [HAVA § 302(a)(1)-(4)] (emphasis added).

Under the clear language of section 302(a), a voter who declares himself to be registered in the jurisdiction where he appears to vote and eligible to vote in the federal election is entitled to cast a provisional ballot. Definition of the term "jurisdiction" is critical to understanding the impact of this section.

We are convinced that the term "jurisdiction," as used in HAVA section 302(a), was intended to mean a municipal jurisdiction of a broader scope than a single voting precinct. "Jurisdiction" is generally defined as "[a] government's general power to exercise authority" or, "[a] geographic area within which political or judicial authority may be exercised." Black's Law Dictionary, p. 855 (7th ed. 1999). Jurisdiction is a broad and rich legal and governmental concept, well beyond a single voting precinct.

In the key section of HAVA cited above, 42 U.S.C. § 15482(a)(1)-(4), the term "jurisdiction" is used twice and the term "polling place" is used four times. The Congress used "jurisdiction" when it meant jurisdiction and "polling place" when it meant polling place. This is another basis for determining that they are separate and distinct concepts for our purposes here.

Additionally, in a closely-related act, the National Voter Registration Act [NVRA], the act defines "registrars' jurisdiction" as geographic area governed by the unit of government which maintains voter registration records. 42 U.S.C. § 1973gg-6(j).

Section 302(a) of HAVA requires an individual to declare that he or she is "registered in the jurisdiction in which the individual desires to vote." Under Iowa law, elections are administered at the county level of government and voter registration records are maintained at the county level. Most Iowans, if asked, would likely identify a county as the jurisdiction in which they are registered to vote. Therefore, we hold that the term "jurisdiction" as used in section 302(a), means an Iowa county. Applying this definition, section 302(a) entitles a voter to cast a provisional ballot, if the voter declares the he or she is eligible to vote and is registered in the county where he or she appears to vote.

The right to cast a provisional ballot is only one aspect of section 302(a). This provision also requires the appropriate election officials to determine whether the individual casting the ballot was "eligible under State law to vote," and, if so, instructs that the "ballot shall be counted as a vote in that election in accordance with State law." 42 U.S.C. § 15482(a)(4) [HAVA § 302(a)(4)]. Again, the term "eligible" is not defined within HAVA. We believe that "eligibility," in this context, is related to who is entitled to vote, not how or where the vote is to be cast. To be qualified to register to vote in Iowa, an individual must be a citizen of the United States and an Iowa resident, at least eighteen years of age, and not claim the right to vote in more than one place. Iowa Const. Art. II, sec. 1; Iowa Code § 48A.5(2) (2003). To be eligible to vote in any election, an individual must meet the constitutional and statutory qualifications and be registered to vote. If election officials reviewing a provisional ballot determine that the voter was registered in the county where the ballot was cast and met the basic eligibility requirements of state law, HAVA dictates that votes on the ballot must be counted.

If "eligible under state law to vote" was read to require the voter being in the correct precinct, the voter would be truthful and accurate in the representations required under HAVA to receive a provisional ballot (i.e., that the voter is registered in the county and eligible to vote) – but would be denied the right to have his or her vote counted. It is extremely unlikely that Congress intended this result.

Finally, it should be noted that allowing voters to cast provisional ballots when they are eligible to vote and registered to vote in the county where the vote was cast is consistent with the purposes of HAVA – making it easier to vote and harder to cheat in elections.

To the degree that Iowa statutes conflict with this interpretation of HAVA, the principles of preemption dictate that the federal law must prevail. With regard to casting provisional ballots, Iowa statutes are closely aligned with the dictates of HAVA. As noted above, Iowa Code section 48.77(4) allows a voter whose name does not appear on the election register and whose registration in the precinct cannot be verified to cast a provisional ballot if "the person insists that the person is a registered voter of the precinct . . ." We believe the portion of this subsection which requires the voter to "insist" that he or she is registered "in the precinct" in order to cast a provisional ballot, is preempted by HAVA, and the instructions of the Secretary of State should be changed accordingly.

The express terms of HAVA section 302(a) neither require nor preclude precinct poll workers from attempting to locate the correct precinct polling place for a voter who is registered in another precinct of the county. We believe the practice of directing voters to the correct polling place is vitally important in order to assure that each voter has the opportunity to cast a vote for every office and upon every public question that voter is eligible to determine. The Election Assistance Commission, which is created under HAVA to serve as "a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections," 42 U.S.C. § 15322 [HAVA § 202], has recommended the inclusion of this step in the provisional voting process. *See BEST PRACTICES IN ADMINISTRATION, MANAGEMENT AND SECURITY IN VOTING SYSTEMS AND PROVISIONAL VOTING: A Tool Kit for Election Administrators and Stakeholders: Issue One*, section IX(B) at pp. 60-61 (published by the EAC on July 30, 2004, available at the EAC website: www.eac.gov/bp) (advising states to "establish sound methods for directing voters to the correct polling place . . ." The suggested methods for doing so include providing "resources to help poll workers direct a voter to his/her voting place.").²

If "the situation is not resolved" because the voter declines to go to an alternate voting location or the voter believes he or she is registered in the precinct, a provisional ballot is provided to a voter. The provisional ballot envelope does not require voters to insist they are registered in the precinct. Rather, the declaration provided which an Iowa voter must sign in order to cast a provisional ballot includes the following statement: "I believe I am a registered voter of this county and I am eligible to vote in this election." Iowa Code § 49. 41(4), as amended by 2004 Iowa Acts, ch. 90 [SF 2269], § 20.³

² Although the EAC is precluded from issuing rules or regulations, or taking "any action which imposes any requirement on any State or unit of local government" (42 U.S.C. § 15329 [HAVA § 209]), the commission is empowered to conduct studies and issue reports regarding election administration issues, with the goal of promoting methods for voting and election administration which "will be the most convenient, accessible, and easy to use for voters . . ." 42 U.S.C. § 15381(a) [HAVA § 241].

³ The full statement provides:

I believe I am a registered voter of this county and I am eligible to vote in this election. I registered to vote in _____ county on or about _____ at _____. My name at that time was _____. I have not moved to a different county since that time. I am a United States citizen, at least eighteen years of age.

Id. at 49.41(4). In 2004, the Iowa Legislature changed this required statement from a representation that the voter is registered in the precinct to a representation that the voter is

Iowa statutes regarding the counting of provisional ballots provide less specific direction. In the days immediately following the election, all provisional ballots are delivered to a county-wide special precinct counting board which is charged with determining whether each ballot should be rejected or counted. Iowa Code §§ 50.20 – 50.23 (2003). "The decision to count or reject each ballot shall be made upon the basis of the information given on the envelope containing the [provisional] ballot, the evidence concerning the challenge, the registration and the returned receipts of registration." Iowa Code § 50.22 (2003). If a provisional ballot is rejected, "the person casting the ballot shall be notified by the commissioner within ten days of the reason for the rejection . . ." *Id.* Iowa election law contains no other provision establishing specific standards for the acceptance or rejection of provisional ballots. Iowa law does, however, contain a clear directive requiring voters to vote at the polling place in their precinct of residence. Iowa Code § 49.9 (2003) ("No person shall vote in any precinct but that of the person's residence."). In addition, Iowa law requires the special precinct counting board to reject an absentee ballot if the voter is not a duly registered voter of the precinct in which the ballot is cast. Iowa Code § 53.25 (2003); 721 Iowa Admin. Code 21.361(2) (indicating that "precinct" in this context "means a precinct established pursuant to Iowa Code sections 49.3 through 49.5").

Historically, the guidance issued by your office to the precinct boards has instructed that provisional ballots should be assessed based upon the same factors which control the counting of absentee ballots and other challenged ballots. *See* Iowa Code §§ 53.25, 53.31 (2003), 721 Iowa Admin. Code 21.361. Given that Iowa law imposed no special criteria for counting various types of challenged, or provisional, ballots and that all of these ballots are reviewed by the same special precinct election board, this practice made good sense. However, the counting process for provisional ballots must be revised to accommodate the preemptive impact of HAVA.

We have concluded that HAVA requires local election officials to count a provisional ballot if they determine that the voter was registered in the county where the ballot was cast and met the basic eligibility requirements of state law. To the extent that Iowa law conflicts with HAVA, the federal act must prevail. HAVA does not, however, affect the ability of the state to enforce existing time, place, and manner requirements as to voting in state or local elections. "The right granted by HAVA is to vote only for those federal offices for 'which the individual is eligible to vote.'" *Bay County Democratic Party v. Land*, 2004 WL 234560 (slip. op. at p. 46), *quoting* 42 U.S.C. § 15482(a) [HAVA § 302(a)]. Because HAVA applies only to federal elections, "the votes for state and local offices and initiatives on out-of-precinct ballots need not be tabulated." *Id.* Indeed, given the unequivocal Iowa law dictate for in-precinct voting we conclude that it would be inappropriate for a counting board to accept any greater portion of a ballot cast outside of a voter's precinct of residence than mandated by federal law. Therefore, only votes on the federal portion of these ballots should be accepted and tabulated by the

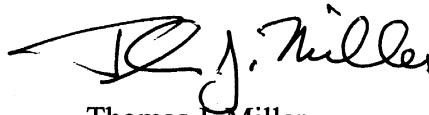
registered in the county.

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counting board.

Finally, we wish to underscore again that poll workers should make every effort to direct voters to the correct polling place – and we urge voters to make every effort to go to their correct precinct -- in order to assure that each voter has the opportunity to cast a vote for every office and upon every public question that the voter is eligible to determine. We hope that, as observed by the Michigan court, "the prospect of having one's entire ballot counted, not just the votes for federal offices, provides a strong incentive to vote in the correct precinct of one's residence."

Sincerely,

A handwritten signature in black ink, appearing to read "T. J. Miller". The signature is fluid and cursive, with a large initial "T" and "J".

Thomas J. Miller
Attorney General of Iowa